that before they accept the confession it was also true.

For the above reasons we think this ground must also fail.

Mr. Seenivasagam also complained that there was no evidence to connect the annonymous letter to the appellant. It is true that according to Dr. Tang, P.W.3, the voice on the telephone denied that he sent the annonymous letter, and we are unable to find any reference to that letter in the confession itself.

In his summing-up the learned judge dealt at some length on this letter. He said that it could have been sent by a member of the gang or it could have been sent by somebody else and then went on to put this question to the assessors:—

"Why should anybody, who knew nothing about the kidnapping, or who had nothing to do with the kidnapping, write this letter so soon after the kidnapping? You might come to a finding, as for myself I would — but you must not be influenced by my opinion — that this letter was, in fact, sent by the kidnap gang."

And then the judge went on to refer to a sentence in the letter which says: " 'We intended to resort to extortion by demanding the sum of $100,000' as being associated with the kidnap. This was clearly a demand for money and you may find that this demand was the intent to ransom which forms the necessary ingredient of the offence." The learned judge went on to refer to the evidence of Dr. Tang where he said that the voice on the telephone said "Originally his gang wanted $50,000 for the ransom."

In our view the learned judge in directing the assessors on this must himself have found as a fact that though this letter was not written by the appellant, it was written by the gang. In this respect we think it is relevant to know that in the charge itself there was allegation that the appellant committed this offence with two others still at large.

In our view this ground should also fail.

In the third ground of appeal, on the question of intention and knowledge, Mr. Seenivasagam, as we understood him, said there was no evidence to show that the appellant's intention was to hold the boy for ransom or to connect the ransom note to the appellant and also the fact that the demand by the appellant was made after the kidnap.

The judge as we have just stated had dealt in great details with the question as to the identity of the writer of the ransom note and he, as it appeared to me held the view that the letter was connected with the kidnap. As we have said we do not see why we should interfere with that finding of fact. On the second point that the demand was made after the kidnap, once it is proved that the two things were connected, as parts of the same transaction, we do not think it is material which happened first, because in our view, there is no doubt that the abduction was made with intention of demanding a ransom. This ground must also fail.

We would therefore dismiss the appeal and confirm the conviction and sentence.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons.*

AH MEE v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) January 6, 1967]

[K.L. — Federal Court Criminal Appeal No. X.40 of 1966]

Penal Code, s. 376 — Rape — Corroboration of evidence of complainant — Corroboration must be independent evidence implicating accused — Demeanour of complainant.

Evidence — Corroboration — Nature of corroboration required — Inadmissible evidence in material particulars — Evidence Ordinance, 1950, ss. 91, 92 & 157.

The appellant had been convicted of rape. The trial judge considered that the complainant's credibility was unimpeached and he stated that he was personally impressed by her demeanour. He thought her evidence consistent throughout and held that her evidence of rape was amply corroborated.

Held: (1) corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence and in this case there was no such corroboration of the evidence of the complainant;

(2) in view of the inconsistencies in the evidence of the complainant it was unsafe to rely on her uncorroborated evidence and therefore the conviction must be set aside.

Per curiam: Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms . . . of such matter except the document itself." The report was information relating to the commission of an offence which "shall be reduced to writing" pursuant to section 107 of the Criminal Procedure Code (Cap. 6), and section 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing.

Cases referred to:—

(1) *R.* v. *Clynes* (1960), 44 Cr. App. R. 158, 161.

(2) *Mohamed Ali* v. *Public Prosecutor* [1962] M.L.J. 230, 231.

(3) *R.* v. *Baskerville* [1916] 2 K.B. 658; 12 Cr. App. R. 81.

(4) *Brabakaran* v. *Public Prosecutor* [1966] 1 M.L.J. 64.

(5) *R.* v. *Redpath* (1962), 46 Cr. App. R. 319.

(6) *R.* v. *Knight* [1966] 1 All E.R. 647.

(7) *Chiu Nang Hong* v. *Public Prosecutor* [1965] 1 M.L.J. 40, 43.

(8) *Powell & wife* v. *Streatham Manor Nursing Home* [1935] A.C. 267.

FEDERAL COURT.

Dato' David Marshall and *N. Sharma* for the appellant.

Haji Suhaimi (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The appellant was convicted in the High Court at Ipoh of rape and sentenced under section 376 of the Penal Code to 5 years imprisonment and 6 strokes of the rattan. An application, made immediately after such conviction, for bail pending appeal was rejected by the trial judge, whereupon such application was renewed before this court during vacation, upon a certificate of urgency signed by defence counsel.

Having perused the record it was decided that this court should deal immediately with the application for bail as a hearing of the appeal itself. As a result, the conviction was quashed and the sentence set aside. We now give the grounds of our decision.

A Chinese female rubber tapper, 17 years old, had alleged that she was raped by the appellant in a rubber estate while she was cycling home to Hamiltonia Estate from the village of Langkap in Lower Perak, at about 6 p.m. on February 11, 1966. He had overtaken her earlier on the road in his motor-car before she reached Palawan New Village and had accosted her. About a half-mile beyond this village she saw the appellant again ahead of her, now on a bicycle. She overtook him, and when she came to a bridge over a stream, he caught up with her, knocked or pushed her off her machine, threatened her with death if she called for help and throttled her into unconsciousness. On coming to, she found herself alone in a rubber estate a short distance from the bridge. She felt pain in her private parts, saw blood on her thighs and her clothing was in disarray. She recovered and put on her underpants, found her bicycle on the ground where she had left it and washed the blood off her thighs in the stream. On reaching home — where she lived with only a younger sister of 15 years for company — she found visitors but explained to them that she had had a fall. After a bath, she retired to bed without supper and after the departure of the visitors told her sister of the rape.

Next morning the two girls went to look for their elder brother in Teluk Anson; failing to find him, they proceeded to Sungei Siput North to see their mother, arriving there late in the day: it was February 12. The elder girl told her mother nothing of what was alleged to have happened to her, neither that evening, nor on the two days that followed, until the evening of the 14th. The younger sister, however, stated that, while she had disclosed nothing either to their mother on the 12th, she did on the next morning tell her of the rape. Strangely enough, it is on record that the mother said in evidence that the elder girl only complained of a sore throat on the night of the 12th as the reason for her weeping; that at no time after the 13th did she question her elder daughter, nor did the latter confirm or deny the story of the younger girl until she herself made the complaint to her mother on the night of the 14th.

On February 13th, the mother took the complainant to Dr. Fakir Chand in Ipoh, told him that the latter had been raped and requested prophylactic treatment. The doctor advised the mother to take the girl to the hospital for examination. He saw no discharge or swelling in the girl's private parts; he noticed no impediment in her speech: in his own words, "I had no difficulty in understanding the complainant and the mother through the interpreter . . . No complaint about any pain in the neck or throat."

On the 14th or 15th they both went again to Ipoh and consulted Dr. Ng Mann Loke, to whom Dr. Fakir Chand was assistant, with the same story. He made a visual examination but saw no discharge or signs of injury to her private parts or thighs. Neither of them complained of any pain or injury to the girl's neck or throat. He managed to persuade them to go to hospital. They accordingly proceeded to the General Hospital, Ipoh, where they were told to make a report first. At the New Town Police Station the report was taken down in writing at 12.45 p.m. on February 15. The complainant's narrative is important for reasons which will appear later and therefore needs to be set out in full. The English translation from Malay follows:—

> "At about 12 noon on February 11, 1966 I left Hamiltonia Estate on a bicycle and went to Langkap town to attend a sewing class. At about 6 p.m. on February 11, 1966 after the class was over I was going home on a bicycle. About 4 miles from Langkap there was a motor car No. M. 7354. Its driver was a male Chinese. This male Chinese called out to me (by name) 'Ah Mooi, Ah Mooi'. I ignored his call and went on my way. When I arrived near a bridge leading to Hamiltonia Estate that male Chinese came on a bicycle from behind me and knocked against me. I fell down and he dragged me into the estate. I shouted for help. No one came and that male Chinese held me by the neck and then raped me. I became unconscious. When I regained consciousness I went back to my working place at Hamiltonia Estate. I felt pain on my private parts and there was bleeding. At the time when the male Chinese raped me he pulled my trousers. I do not know that man's name. I can identify him if I see him again. On February 12, 1966 I returned to my mother's house at Sungei Siput."

At 9 p.m. the same evening a Government medical officer examined the complainant at the District Hospital, Teluk Anson, and found some old scratch marks on the neck, possibly caused by finger nails, but he could not say how many days old they were. She had made no complaint about her neck, and nothing had been said of her

throat. She apparently did not disclose to him the origin of the scratches. At 11 a.m. on the 16th he examined her again. No injury was seen in the vulva or vagina, although the hymen was torn and ragged; the tear was of indeterminable age; but not only was no tear seen in the vagina, there was no blood on the gloves used in such examination. He agreed that there were other possible causes, accidental or otherwise, for the tear besides sexual intercourse.

The evidence of this doctor was, of course, vital to establish a charge of rape. Yet it was given in a manner which seems rather vague and perfunctory. He assumed, in answer to a hypothetical question by the deputy public prosecutor, that the girl was unconscious to explain the absence of injuries to her private parts and he assumed again, in answer to the court, that the alleged copious bleeding was a fact on which he could form his opinion as to penetration. Having carefully examined the record, however, we think it had been sufficiently appreciated in the court below that both these assumptions were unwarranted, for the simple reason that they were allegations of fact, resting entirely on the uncorroborated evidence of the girl alone, which fell far short of being proved to the degree of satisfaction required for proof of essential ingredients of a criminal offence. While on this point, it is perhaps pertinent to observe that no intravaginal swabs were taken and no attempt made to discover if there had been any intromission of semen, which should have afforded conclusive proof of intercourse, if any. With all due respect to the learned trial judge, we were and are of the opinion that penetration was not satisfactorily proven.

That the evidence of the complainant was uncorroborated admits of no argument. The learned deputy, in his answer to a submission of no case, conceded that there was no corroborative evidence as to the identity of the assailant. The trial judge, however, considered the complainant's credibility unimpeached; he was favourably impressed by her demeanour and "the extreme care she took to be sure before announcing her identification" of the appellant's motor-car and of the police officer conducting the identification parade; he thought her evidence consistent throughout, and, in the result he held her "evidence of rape amply corroborated".

With respect, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence: see *Clynes*.[1] Consistency is not such corroboration and section 157 of the Evidence Ordinance should be read in the light of my exegesis thereof in the case of *Mohamed Ali*,[2] which I quote:

"It will not be out of place here to say a few words about section 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R.* v. *Baskerville*.[3] In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from "corroboration" as it appears in section 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances surrounding any relevant transaction, it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true."

The learned trial judge, in his grounds of decision referred to a passage in my judgment in the recent case of *Brabakaran* [4] where I said in a rape case, as follows:—

"Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally well be afforded by established facts and the logic of established facts sometimes speaks more eloquently than words."

The principle so stated is merely an aspect of the same applied in *Redpath;* [5] see also *Knight;* [6] but, with respect, *Brabakaran* is no authority for any departure from the strict rule laid down in *Clynes* [1] and *Baskerville*.[3]

While on this subject, it would be as well to refer also to *Chiu Nang Hong* [7] where Lord Donovan said:—

"Their Lordships would add that even had this been a case where the learned judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should in their Lordship's view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed."

That decision of the Privy Council being binding on this court and the learned trial judge having said no more in the instant case than I had done in the other, it follows that again the conviction cannot be left to stand.

Apart from what has been stated above, there are other grounds which require that the conviction be quashed. The first is the reception of inadmissible evidence in a material particular. The complainant had clearly and unmistakably given the number of the appellant's car as M. 7354 in her police report. In truth it was M. 6049, whereas M. 7354 belonged to a motorised grass-cutter which had become defunct since 1957. The judge, nevertheless, accepted her explanation of an honest mistake, that she was uncertain about it when the police requested her to give the number of the vehicle involved.

Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms . . . of such matter except the document itself." The report was information relating to the commission of an offence which "shall be reduced to writing" pursuant to section 107 of the Criminal Procedure Code (Cap. 6), and section 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing. Hence it should have remained uncontradicted, on the prosecution evidence, that whoever might have raped the complainant he was certainly not this appellant, as owner of the vehicle M. 7354. Not to put too fine a point on it, one might have thought an inadvertant transposition of one or two digits quite possible and probable due to a genuine lapse of memory, but for the complainant to suggest that she could honestly have believed that "7354" bears any relation whatsoever to "6049" passes all understanding.

In this connection it may further be observed that the learned trial judge "observed the complainant's behaviour in (the identification of the appellant's car) and noted the extreme care she took in scanning the court compound before going up to Exhibit P1 and how she walked around the car and how she paused to see the car from the rear before she identified it" although she had previously identified the same car at the preliminary enquiry. Nevertheless, the judge was "impressed by the extreme care she took before announcing her identification" and such "favourable impression was later on further strengthened by the same care and attention she showed when asked to identify the officer who conducted the identification parade; she was uncertain, and despite several voice tests in court and requests to the officer to remove his cap, and the obvious implication of the identification, remained uncertain and refused to identify this officer". In the result this bit of play-acting created an impression on the judge that she was "a person who would not readily make any allegation or statement of fact uncertain of the truth of the same." Speaking for myself, I think her overacting in these two specific instances are facts which lead me strongly towards a contrary inference.

If she was to be believed *in toto*, then there is no accounting for the serious discrepancies between her evidence and the report she had made to the police. In court her story was that she was throttled into unconsciousness immediately after she was knocked off her bicycle, or after she was overtaken in a short chase of 25 feet — a trifling and immaterial variation of detail — but she knew nothing of what happened thereafter until she came to. On the other hand, the report which she confirmed as correct with her signature reads: "I fell down and he dragged me into the estate. I shouted for help. No one came and that male Chinese held me by the neck and then raped me. I became unconscious . . . At the time the male Chinese raped me he pulled my trousers." There was no mention of throttling or squeezing of her neck. As an unambiguous story, her evidence told of her passing out in the course of the rape; during part of which she was fully conscious and capable of resisting. In her report, however, she had fainted by the bridge 150 yards from the scene of the assault. The two stories are clearly irreconcilable. Finally, three doctors saw no signs of any injury to her neck or throat which could have rendered her speechless and unable to make the complaint herself to her mother for 72 hours.

To avoid undue emphasis on demeanour, it may be well to remember what was said by Lord Wright, and often quoted, from his judgment in *Powell & wife* v. *Streatham Manor Nursing Home,*[8] of the possibility of judges being deceived by adroit or plausible knaves or by apparent innocence.

For the above reasons the appeal was allowed and the conviction quashed.

Appeal allowed.

Solicitors: *N. Sharma.*

SHANGHAI HALL LTD. v. TOWN HOUSE HOTEL LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Raja Azlan Shah J.) January 6, 1967]

[K.L. — Federal Court Civil Appeal No. X.35 of 1966]

Practice and Procedure — R.S.C., 1957, O. 14 r. 6 — Leave to defend — Leave granted on condition of paying $24,000 into court or providing security for same — Triable issue — Nature of counterclaim — No proof of lack of bona fide — Whether unconditional leave should be granted.

The respondents as chief tenants of certain premises claimed against the appellants, their sub-tenants, vacant possession of the said premises, arrears of rent and other reliefs. The appellants contended that the tenancy could only be terminated by a year's notice. They also alleged that the respondents were in breach of a convent in the tenancy agreement and counterclaimed for damages in the sum of $39,000, a sum larger than the respondents' claim. The learned trial judge held that there was only one triable issue before him and that there was no dispute as to the arrears of rent. He therefore gave the appellant leave to defend on payment of $24,000 into court and directed that the counterclaim be disposed of in an independent action.

Held: (1) the learned trial judge after holding that there was one triable issue should have gone further and considered whether the appellant's defence was made in bad faith or whether there were suspicious circumstances in the mode of presenting it or that the defence was a sham; and as there were no such circumstances in this case he should have granted unconditional leave;